

**Subject:** Proposed Critical Habitat for Southern Resident Killer Whales  
**From:** "Stephanie Buffum Field" <stephanie@sanjuans.org>  
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**To:** <orcahabitat.nwr@noaa.gov>

August 14, 2006

Donna Darm  
Chief, Protected Resources Division  
1201 NE Lloyd Blvd., Suite 1100  
Portland, OR 97322-1274  
VIA email: orcahabitat.nwr@noaa.gov

**RE: Proposed Critical Habitat for Southern Resident Killer Whales**

Dear Ms. Darm,

Thank you for the opportunity to comment on the *Proposed Critical Habitat for Southern Resident Killer Whales* dated June 15, 2006 (Federal Register Vol. 71, No. 115, pages 34571-34588). We appreciate the hard work of the national Marine Fisheries Service staff to develop this plan as well as the Recovery Plan.

As a co-petitioner to list the Southern Resident Killer Whale (Orca) as an Endangered Species under the federal Endangered Species Act, Friends of the San Juans (FRIENDS) is committed to working toward a recovery plan that supports and protects the full recovery of the orca.

FRIENDS is a nonprofit public interest organization whose mission is to protect the land, water, sea and livability of the San Juan Islands through science, policy, law, education, and citizen activism to protect and restore the San Juan Islands natural resources. The vast majority of FRIENDS staff, board, and members live or recreate around the San Juan Islands. FRIENDS has been involved in land and sea issues for over 25 years.

The Endangered Species Act, 16 U.S.C. Section 1532(5)(A) defines Critical habitat as:

“(i) the specific areas within the geographical area occupied by the species, at the time it is listed ..., on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed..., upon a determination by the Secretary that such areas are essential for the conservation of the species.”

The main threats to Orca throughout the region are low prey abundance, environmental contaminants, vessel effects and sound, and oil spills. A comprehensive critical habitat area is needed to address *all* of these threats if we are to recover the southern residents to health.

FRIENDS strongly feels that the military exclusion is contrary to both part (i) and the nearshore exclusion is contrary to part (ii). Accordingly, we submit these comments in an effort to encourage the inclusion of the 18 military sites covering 112 square miles of proposed critical habitat.

**Military Area Exclusion**

Under the Endangered Species Act, the Secretary of Commerce shall designate critical habitat on the basis of best available science, and only may exclude an area from critical habitat if the benefits of exclusion

outweigh the benefits of designation, unless excluding the area will result in the extinction of the species concerned (16 U.S.C. Section 1533 (b)(2)). In this plan, the agency proposes to exclude from the designation 18 military sites covering nearly 112 square miles of habitat.

The Service proposes to exclude the 18 military sites because of the high priority on national security, the potential for critical habitat designation to have some impact on military readiness, and the fact that collectively, the military sites represent only a small percentage of the total habitat. Although FRIENDS recognizes the need for safeguarding our national security, we feel that these exclusions are 1) too large, 2) should be modified for military action, 3) should not exclude non-military actions, and 4) should not exclude military actions not necessary for immediate national security threats.

1. Size and configuration. The most troubling of the military exclusions is a vast area that spans the entrance to central Puget Sound—between Whidbey Island and Port Townsend, extending miles out into the Strait of Juan de Fuca. Orcas will have no way to get into the central Sound without crossing a huge unprotected stretch.

2. Modification of military actions in special zones.

The Navy has been a good partner in many aspects of orca protection, and we can envision a partnership in which the Navy more proactively works to protect and restore orcas. FRIENDS feels that the excluded areas should be reduced in size and also that a Memorandum of Understanding (MOU) should be developed in parallel with the Critical Habitat plan in which the military agrees to modify their activities including the use of sonar technology, where feasible, in order to protect orcas within the excluded areas.

For example, this past July, NRDC attorneys raced to court to block the U.S. Navy from unleashing a barrage of ear-splitting sonar into the waters off Hawaii as part of a massive military training exercise. Whales exposed to mid-frequency sonar have repeatedly stranded and died on beaches around the world. In an attempt to avoid NRDC's lawsuit, the Navy took the unprecedented step of declaring itself exempt from the primary U.S. law that requires measures to protect marine mammals. The court sided with NRDC and found that the Navy's planned sonar use violated a second key environmental law as well, noting that NRDC had submitted "considerable convincing scientific evidence" of the dangers of sonar to marine life. The judge prohibited the Navy from going forward with its sonar use as planned and ordered the Navy to sit down with NRDC and decide on a set of protective measures to be put in place during the month-long exercise. In the settlement the Navy agreed to create a sonar-free buffer zone around the newly established Northwestern Hawaiian Islands Marine National Monument, as well as significantly improve its monitoring of marine mammals during sonar drills and implement other important safeguards.

On many occasions, Fred Felleman, et al, have recommended that Navy submarines could be used to identify orcas when they travel into the ocean. Navy ships could serve as research platforms to observe bird and fish movements. And shore-based facilities could easily track transient orcas in Hood Canal and other locations.

Much more needs to be done to protect whales and other marine life from high-intensity sonar, especially in biologically rich waters that Southern Resident Orca frequent.

Specific areas of concern that, at a minimum, should be addressed in a MOU include:

- A. Create a sonar-free buffer zone around the all areas when orca are present; as well as well as significantly improve its monitoring of marine mammals during sonar drills and implement other important safeguards.
- B. Mid and low frequency sonar. During training and testing activities, the Navy should stay clear from

active orca areas using BAS

- C. Vessel movement. Naval, submarine and other vessel interactions should be minimized.
- D. Noise. Noise from construction and other nearshore activities should take orca and orca prey presence into consideration.
- E. Toxic contaminants. In both contaminated sediment areas and in discharges from onshore and off shore operations, the military should eliminate toxic contaminants that are biomagnified in the food web, such as polychlorinated biphenyls (PCBs) and others.

### 3) Critical Habitat Exclusion Areas should not include non-military actions

The areas that are excluded from critical habitat designation for military purposes, should not apply to nonmilitary federal actions. For example, nonmilitary stormdrains or wastewater outfalls that flow to these areas should be included.

Oil spills are of particular concern. The risk of oils spills continues to grow in Puget Sound. Oil spill risks increase with more vessel traffic in Puget Sound, and more traffic is projected for the Sound as more cargo comes to our ports. If an oil spill occurs in the excluded areas, should the Coast Guard reduce their effort there? The waters of the Sound should not be divided in this way when it comes to management of the resource thus, both military and non-military oil spill response and recovery plans should address and include critical habitat designation issues.

### Nearshore Exclusion

Most of Puget Sound's problems originate from pollution and habitat destruction on the shore. Many actions in which federal funding, permits, or projects are involved occur in the nearshore. The nearshore areas of Puget Sound (which includes the areas where water is less than 20 feet deep) are important habitat for salmon as well as many species that make up the food web of the Sound. As top predators, orcas are dependent on a healthy food web. FRIENDS has documented these relationships in our ongoing research. FRIENDS believes that the Service should not include a nearshore exclusion in the final regulation because of the physical, biological and chemical continuum of the Sound's water and sediment to the edge of the shoreline. Our specific comments include:

1. Prey Abundance. A key goal of the Recovery Plan is to "Rebuild depleted populations of salmon and other prey to ensure an adequate food base for recovery of the Southern Residents." Achievement of this goal is absolutely essential to recovering the Southern Residents. Studies cited in the Federal Register Notice found that salmon were found to represent over 96 percent of the prey during the summer and fall.

2. Contaminated Sediment. According to research results cited in the Recovery Plan, Southern Residents carry as high a load of PCBs as transient populations and at levels likely to "exceed the toxicity levels believed to cause health problems in other marine mammals." There are two pathways for contamination to enter the food web – direct and indirect. The direct pathway relates to consumption from the bottom up within the food chain, and the indirect pathway relates to consumption of larvae and plankton by larger species. In both cases, it is vitally important that contaminated sediment sites in Puget Sound be cleaned up, in order to protect orca. Many of the contaminated sites in Puget Sound occur in the nearshore.

3. Toxic discharges. One dead orca found in 2002 harbored perhaps the highest concentration of the banned PCBs ever recorded in a marine mammal - dozens of times higher than levels that affect growth, reproduction and immune responses in other mammals. Mixing zones, for example, are a major concern because toxic contaminants are allowed in the water in the nearshore at high concentrations.

4. Noise. Noise is a major factor for orcas and major steps need to be taken to address this issue in the nearshore, such as adjacent to docks. Orca whales calve and feed in Puget Sound waters; their fishing, calf-rearing and travels are disrupted by noise from marine traffic, loading, barging operations, underwater military activities and testing.

5. Major Project Review. The critical habitat map should include the nearshore because of propose major projects, such as the tidal energy projects proposed for San Juan Channel and Spieden Channel in San Juan County. The Public Utility District No. 1 of Snohomish County (the "PUD"), applied to the Federal Energy Regulatory Commission for a preliminary permit to assess the feasibility of utilizing tidal energy in San Juan and Spieden channels. If such projects are proposed within the critical habitat (i.e., one that extends to the water's edge), then appropriate federal review will be triggered to protect orcas in the event that such tidal energy projects proceed to the pilot project and licensing stages.

6. Climate Change: Given predictions of sea level change, the excluded area, as defined by water depth greater than 20 feet will shift over the next decades. It is more practical and will be much easier to manage the resource if the critical habitat boundary is set at the shoreline instead.

7. Bi-lateral Transboundary Orca Conservation Planning Between Canada and the United States: As Canada is looking at the same suit of issues surrounding the critical habitat for orca, we hope that the United States can create a bi-lateral international conservation plan that will accommodate this transboundary species.

In closing, as co-petitioners to list the Southern Resident Killer Whale as an Endangered Species under the federal Endangered Species Act, FRIENDS feels it is essential to the continued vitality of this totemic species to take a comprehensive and transboundary or bi-lateral approach, to designating critical habitat. Therefore, FRIENDS feels it is inappropriate both the exclude the 18 military sites and their 112 sq miles of waters, as well as the nearshore environment. We respectfully request that you expand the scope of the critical habitat area to include these two significant orca habitat areas.

We look forward to working with you to restore this transboundary orca population.

Sincerely,

Stephanie Buffum Field  
Executive Director

Stephanie Buffum Field  
Executive Director

*Friends of the San Juans*  
P.O. Box 1344

Friday Harbor, WA 98250  
360.378.2319 Tel  
360.472.0404 Cell  
360.378.2324 Fax  
[Stephanie@sanjuans.org](mailto:Stephanie@sanjuans.org)

*Protecting the San Juan Islands for over 25 years*  
[www.sanjuans.org](http://www.sanjuans.org)

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